reached in *Jennings* v. *Dark,* although in accord with the weight of authority,[18] would therefore appear to be erroneous upon principle, and the members of the association, it is submitted, should have been held liable upon the contract as general partners.

CREATION OF THE RELATION OF DEBTOR AND CREDITOR BETWEEN BANKER AND CUSTOMER.—The legal relations between banker and customer, though theoretically regulated entirely by contract, are, in the absence of express stipulation, determined by commercial usage in contemplation of which the parties are presumed to have dealt. The legal consequences of this complicated contract are, on the other hand, ascertained by the application of fundamental principles of agency and negotiable paper. While the numerical weight of authority has, in accordance with sound theory, deduced the rule that the liability of a bank receiving paper to be sent for collection to a distant point is dependent entirely upon the exercise of due care in the selection of a suitable correspondent,[1] a considerable number of courts have nevertheless established the contrary doctrine of absolute liability by interpolating into the contract a term discernible neither in commercial usage nor in the reasonably presumable intention of the parties. This doctrine, though originally founded on a supposed analogy to the liability of an independent contractor for the torts of his servant,[2] is now based on broad and persuasive considerations of public policy indicating that the recognition by law of this obligation, which is like that of a *del credere* factor, will best "promote the general welfare of the commercial community."[3]

The property rights in negotiable instruments transferred to a bank are, like the other incidents of the contract, derived primarily from the nature of the original transaction. If the checks or drafts are regarded by both parties as so much cash, the contract is one of deposit and title to the paper passes to the banker who, as in the case of a general deposit of cash, becomes forthwith the debtor of his customer.[4] If, however, the instrument is received for collection merely, title remains in the customer and the relation between him and the banker is that of principal and agent.[5] The mere fact that the collecting bank has credited the depositor with the amount of his

---

parties, see however Hoyt *v.* McCallum (1902) 102 Ill. App. 287, but merely results from an application of the rules of law to the contract as written by them; nor is there involved a nullification of franchises. Francis M. Burdick, Are Defectively Incorporated Associations Partnerships? 6 COLUMBIA LAW REVIEW 1.

[18]Burdick, Partnership 45.

[1]Dorchester & M. Bank *v.* M. E. Bank (Mass. 1848) 1 Cush. 177; Guelich *v.* Nat. State Bank (1881) 56 Ia. 434; Daly *v.* Butchers' and Drovers' Bank (1874) 56 Mo. 94.

[2]Allen *v.* Merchants' Bank of New York (N. Y. 1839) 22 Wend. 215.

[3]Exchange Nat. Bank *v.* Third Nat. Bank (1884) 112 U. S. 276; Bailie *v.* Augusta Sav. Bank (1895) 95 Ga. 277; Davey *v.* Jones (N. J. 1880) 13 Vroom. 28; and see Morse, Banks and Banking (3rd ed.) §§ 272 *et seq.;* 1 Daniel, Neg. Instr. (4th ed.) § 342.

[4]First Nat. Bank *v.* Armstrong (1889) 39 Fed. 231.

[5]Commercial Bank *v.* Armstrong (1892) 148 U. S. 50; Evansville Bank *v.* Ger.-Amer. Bank (1894) 155 U. S. 556; Nat. Bank *v.* Seaboard Bank (1889) 114 N. Y. 28; Akin *v.* Jones (1894) 93 Tenn. 353.

paper will not divest him of his title, for it is universally recognized that this credit is provisional only and may be cancelled if collection cannot be made.[6] Furthermore, this title may be asserted not only against the initial bank[7] but also against a correspondent to which in the course of collection it may have been necessary to transmit the paper. The liability of this sub-agent bank is enforcible, moreover, not only while it holds the paper[8] but also so long as it is in possession of the proceeds thereof.[9] It exists in addition to the absolute liability of the collecting bank and the consequent absence of privity between the sub-agent and the customer,[10] and rests on the principle that an action for money had and received will lie against one who has in his possession funds which ought to be paid over to another.[11] When, however, the proceeds of the collection are actually received by the collecting bank, commercial usage authorizes it to mingle such money with its general funds. This results necessarily in the termination of the agency and in the creation of the relation of debtor and creditor;[12] but since the mingling is the condition precedent to this change of status, it follows that the depositor's title to the check or its proceeds cannot be affected either by the act of the sub-agent in crediting the collecting bank with the amount of the paper,[13] or by the act of the latter in declaring itself, before actual possession of the proceeds, the debtor of its customer.[14]

The chief difficulty arises in determining whether a given transaction is in fact a general deposit as of cash or a deposit for collection. Though the question depends on the circumstances of each case, the presumption is that checks or drafts are deposited in a bank merely for collection.[15] To produce the contrary result it must clearly appear that the paper was, according to business usage or the intention of both parties, to be treated as cash. It is quite well settled, moreover, that crediting the customer with the amount of the check whether this be done in his pass-book or in the accounts of the bank is, because of the provisional character of this credit, by no means conclusive that the paper was received otherwise than for collection.[16] It has even been held that the collecting bank may recover from the

---

[6]See St. Louis etc. Ry. Co. *v.* Johnston (1889) 133 U. S. 566; Balbach *v.* Frelinghuysen (1883) 15 Fed. 675; Mfrs'. Nat. Bank *v.* Cont. Bank (1889) 148 Mass. 553.

[7]Commercial Bank *v.* Armstrong *supra; In re* Armstrong (1887) 33 Fed. 405.

[8]Sweeny *v.* Easter (1863) 1 Wall. 166.

[9]First Nat. Bank *v.* Bank of Monroe (1887) 33 Fed. 408; Commercial Nat. Bank *v.* Hamilton Nat. Bank (1890) 42 Fed. 880; Nat. Exch. Bank *v.* Beal (1892) 50 Fed. 355.

[10]Hoover *v.* Wise (1875) 91 U. S. 308.

[11]First Nat. Bank *v.* First Nat. Bank (1881) 76 Ind. 561.

[12]First Nat. Bank *v.* Davis (1894) 114 N. C. 343; Marine Bank *v.* Fulton Bank (1864) 2 Wall. 252.

[13]*In re* Armstrong *supra.*

[14]Levi *v.* National Bank (C. C. U. S. 1878) 5 Dill. 104.

[15]Dickerson *v.* Wason (1872) 47 N. Y. 439; Beal *v.* Somerville (1892) 50 Fed. 647; Ditch *v.* Western Nat. Bank (1894) 79 Md. 192; and see *In re* State Bank (1894) 56 Minn. 119.

[16]Nat. Gold Bank *v.* McDonald (1875) 51 Cal. 64.

depositor any money paid in the erroneous belief that a collection had been effected.[17]

A novel situation was presented to the court in the recent case of *Bank of Big Cabin* v. *English* (1910) 111 Pac. 386. Here the plaintiff directed his agent to forward the proceeds of the sale of certain goods to the defendant bank. The agent's banker, however, instead of forwarding the money paid it to a third bank which, in pursuance of directions received, credited the defendant on behalf of the plaintiff. The defendant thereupon credited the plaintiff with the amount in question, but on learning that the intermediate bank had later become insolvent, sought to cancel this credit. The plaintiff argued that the payment to the intermediate bank was payment to the defendant and that the credit in his favor was therefore unconditional. The court, however, very properly reached the conclusion that the circumstances of the case were in their legal effect analagous to those involved in a contract for collection and that the credit in favor of the plaintiff must have been intended to be provisional only and could consequently be cancelled. The view thus adopted, that the defendant received the credit as it would a draft on another bank, is not only consistent with the facts, but also in perfect harmony with the unmistakable tendency of the courts to deny the existence of the debtor relation until an actual mingling of funds has occurred.

EFFECT OF JUDGMENT AGAINST THE PRINCIPAL IN SUBSEQUENT ACTION ON SURETY'S SEVERAL CONTRACT.—It is fundamental that in the absence of fraud, collusion, or want of jurisdiction, which always furnish ground for collateral impeachment, a judgment is conclusive between parties and privies only, except as to the fact of its rendition. The applicability of this doctrine to the relation of principal and surety necessitates an inquiry into the precise nature of the latter's obligation.[1]

Whenever, as in bail,[2] replevin,[3] or injunction[4] bonds, he undertakes to abide the event of judicial proceedings, no peculiar principle of *res adjudicata* or of suretyship need be invoked, for it is obviously the very nature of his contract that liability shall attach as the result of a judicial determination adverse to his principal. Such was the recent case of *Calhoun* v. *Gray* (Mo. 1910) 131 S. W. 438, in which the surety was sued on a bond conditioned for the payment of all costs which might accrue in a certain action. In deciding the effect of an adjudication against the principal for such costs, the court considered that had the obligation taken the more usual form in which the surety binds himself for the faithful discharge of official duties or the due performance of a contract, the judgment would have been merely *prima facie* evidence of his liability, but that since he had actually contracted to answer for whatever costs were awarded in the action then pending, the judgment therein must be conclusive. Although, in view of the character of the defendant's undertaking, the result reached is undoubtedly correct, the position taken with respect

[17]East-Haddam Bank *v.* Scovil (1837) 12 Conn. 303.

[1]The discussion will be confined to suretyship in its narrowest sense.

[2]McChristal *v.* Clisbee (1906) 190 Mass. 120.

[3]Richardson *v.* Bank (1897) 57 Oh. St. 299; Kennedy *v.* Brown (1878) 21 Kan. 171.

[4]Lothrop *v.* Southworth (1858) 5 Mich. 436.